IN THE COURT OF APPEAL

AT NAIROBI
CRIMINAL APPEAL NO. 198 & 258 OF 2007

BERNARD IRANDISI SHIREESI &

MICHAEL OTONGO LUYO …….…...…… APPELLANTS

AND

REPUBLIC ……..…….…..……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ.) dated 9th November, 2004

in

H.C.CR.A.NOS.725, 726 OF 200)

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JUDGMENT OF THE COURT

The two appellants herein, *Bernard Irandisi Shiresi* and *Michael Otong'o Luyo*, were jointly charged in the Chief Magistrate's court at Kibera in Nairobi with robbery with violence contrary to *section 296(2)* of the Penal code.

The prosecution case was that, the appellants who were in a group of six invaded *Neighbour's Bar*, Kawangware on the night of 3rd May 2000 and about 10.30 p.m. while armed with knives and robbed *Alfred Njuguna (PW1)* of his wallet containing Kshs.5,200 and 21 US dollars and at the time of the robbery, beat Alfred Njuguna. After a full trial, they were convicted of the offence of robbery with violence contrary to *section 296(2)* of the Penal Code and both appellants were sentenced to suffer death in accordance with the law.

Dissatisfied with the verdict, the appellants appealed to the superior court but on 9th November, 2004, the superior court upheld both conviction and sentence in relation to the appellants whereupon the appellants lodged an appeal in this Court listing the following grounds:-

1. That the 1st appellate court Judges erred in law by failing to analyse and re-evaluate the evidence on record exhaustively.

2. That the learned 1st appellate Judges erred in law by failing to find that the appellants were not afforded secure protection of law contrary to section 77(2)(c) of the Constitution of Kenya.

At the hearing of the appeal, the appellants were represented by learned counsel, *Mr Ngumbau* and the state was represented by learned Senior State Counsel *Mr Monda*.

In his submissions, Mr Ngumbau stated that had the superior court exhaustively analysed and evaluated the evidence, they would have noticed that the complainant, Alfred Njuguna (PW1) and *Simiyu Wekesa (PW3)* did not immediately after the alleged incident give the names of the appellants to the police or sufficiently describe them in their statements to the police and as a result the prosecution evidence or identification was incompetent and unsafe. In addition, *Joshua Mboghori (PW2)* who was the arresting officer did not say that PW1 was able to identify the appellants.

In support of this submission, the learned counsel for the appellant relied on this Court's decision in the case of *Joseph Manutu Nabalu and two others –vs- Repuboic, Criminal Appeal Nos.139-141 of 2004* (unreported), where the complainant had testified that three appellants (the alleged robbers) were well known to her as neighbours and that when she reported the matter to the police, she gave the names of the appellants to the police. However, when the police officer who had allegedly been given the names testified, he wavered on whether he was given one name or three names and instead, stated that he had only arrested one of them and that he did not know who had arrested the other two.

As the arresting officer who allegedly arrested the other was not called to give evidence, this Court acquitted the appellants. Consequently, he urged the court to follow the case and find that failure to give the names and the description was fatal to the case. Counsel further contended that as PW3 was allegedly hiding in a dark corner of the bar, he could not have identified the appellants. To reinforce his submissions that the appellants were not properly identified because the first appellant was arrested nearly 15 days after the incident, and if PW4 and PW3 had immediately identified him, and recognized him, the arrest should have been immediate. Counsel stressed that the courts below failed to consider the defences of the appellants.

On the second ground counsel submitted that on 31st May 2001, the court heard the evidence of PW3, PW4 and that of the two appellants with unusual dispatch thereby denying the appellants their right to secure protection of law. In short, he urged the Court to hold that the appellants were not accorded sufficient time to prepare their respective cases and according to the learned counsel, the conclusion of the case with expedition on the same day, violated *section 77(2)(c)* of the Constitution.

In opposing the appeal, *Mr Monda,* learned Senior State Counsel, invited the Court to find that the superior court had properly re-evaluated and analysed the evidence, and this was apparent from the contents of the challenged judgment itself. He further submitted that both PW1 and PW3 as held by the two courts below, had sufficiently identified the two appellants because there was sufficient lighting in the bar. In addition, the identification was by recognition because the two appellants had prior to the robbery, been regularly seen by the two witnesses at the Kawangware bus stage.

As regards the circumstances of the arrest of the two appellants, both PW1 and PW3 did participate in pointing out the two appellants to the police for the purpose of arrest and unlike the situation prevailing in the *Nabatu* case, supra, where the arresting officer in respect of the two of the three appellants was never called to testify, in the case before us the arresting officer (PW2) did testify and further confirmed that the appellants were identified to him by PW1 and PW3 and therefore the cited case was clearly distinguishable from the matter at hand. As concerns the challenge that the appellants' defences were not considered by the courts below, the learned Senior State Counsel submitted that this was incorrect because the consideration of the defences is apparent on the face of the judgments of the two courts below. Finally, as regard the alleged violation of the appellants' constitutional right under ***section*** *77(2)(c)* counsel submitted that there is no record that the appellants were denied an adjournment in order to prepare their respective cases or that the court by expediting the hearing on 31st May 2001 did violate any

substantive or procedural law to the detriment of the appellants. In addition, the appellants did not raise the alleged contraventions in the two courts below as stipulated in the Constitution and therefore the raising of the alleged contravention in this Court is an afterthought.

As the second and final Court, we have carefully considered the record including the two grounds relied on by the appellants and fully agree with the submission made by the learned Senior State Counsel both on the issue of identification and on the issue of the alleged contravention of the constitutional rights of the appellants. In the circumstances, the conditions for identification were conducive and the identification was by recognition a well. Furthermore, it is clear from the judgment of the superior court that it had sufficiently re-evaluated the evidence as required. Regarding the alleged violation of *section 77 (2)(c)* of the Constitution, we have perused the record and have been unable to detect any procedural impropriety on the part of the court in the conduct of the proceedings on the 31st May 2001. We are also unable to agree that, in the circumstances, the efficient conduct of the proceedings could even remotely constitute a contravention of the right of equal protection of law. On the contrary, proper expedition does enhance that protection.

All in all, both grounds of appeal must fail and accordingly, the appeal is accordingly dismissed.

DATED at Nairobi this 24th day of September 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL